LIM MENG SEE v. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Laville, J.) February 27, 1950]

[Muar — Criminal Appeal No. 7 of 1949]

Criminal Procedure Code, ss. 163, 164, 165, 166, 170 and 422 — Misjoinder of charges — Illegality — Whether a new trial should be ordered.

The appellant in this case was convicted on three charges (1) cheating by issuing on 20.2.49 a cheque in favour of Looi Cheok Hoong knowing that the bank on which it was drawn had no funds available to meet it; (2) criminal breach of trust in respect of $1,250.00 entrusted to him on 21.2.49; (3) criminal breach of trust in respect of $1,000.00 entrusted to him on 23.2.49.

Held, (1) that there has been a misjoinder of charges in this case and that the misjoinder was an illegality which could not be cured under s. 422 of the Criminal Procedure Code; (2) that as the misjoinder of charges was illegal and as there was on the facts no evidence of entrustment of the money, a retrial could not be ordered.

Cases referred to:—

(1) *Subramania Iyer v. King-Emperor* 28 I.A. 257.

(2) *Rex v. Sakandar Khan* (1939) M.L.J. 123.

(3) *Seng Sai Kee v. Rex* (1940) M.L.J. 246.

CRIMINAL APPEAL from Sessions Court.

R. H. V. Rintoul (*S. Shunmugam* with him) for the appellant.

M. Suffian for the respondent.

Cur. Adv. Vult.

Laville, J. : — The first submission by appellant is that his trial on three charges was illegal because it did not comply with the provisions of sec. 163 of the Criminal Procedure Code.

The charges were (1) cheating by issuing on 20th February, 1949, a cheque in favour of Looi Cheok Hoong knowing that the bank on which it was drawn had no funds available to meet it; (2) criminal breach of trust in respect of $1,250 entrusted to accused on 21st February, 1949; (3) criminal breach of trust in respect of $1,000 entrusted to accused on 23rd February, 1949.

The learned Deputy Public Prosecutor agreed that there had been a misjoinder of charges contrary to sec. 163 of the Criminal Procedure Code, but argued that it was curable as an irregularity under sec. 422 of the Criminal Procedure Code.

Sec. 163 states that for every distinct offence there *must* be a separate charge and separate trial except in cases covered by ss. 164, 165, 166 and 170 of the Criminal Procedure Code.

Sec. 164 lays down that three offences covered by the same section of the Penal Code, if committed within one year, may be charged and tried together. In the trial of the case under appeal, a charge under sec. 420 was charged and tried with two charges under sec. 406, Penal Code. This clearly is not covered by sec. 164 of the Criminal Procedure Code.

Sec. 165 lays down that if in one series of acts, so connected together as to form the same transaction, more offences than one are committed by the same person, those offences may be charged and tried together. In the case under appeal three separate transactions are charged against the accused. They took place on three separate dates and the transaction of the 20th February (1st charge) had no connection with the other two transactions of a similar nature which took place on the 21st and 23rd February.

Sec. 166 of the Criminal Procedure Code likewise is ruled out as the series of acts charged against the accused are in each case a separate series of acts and though it is possible that each series may constitute several offences yet the offences arise from a separate series of acts.

Sec. 170, Criminal Procedure Code, does not apply as it deals with the joinder of offenders rather than of offences.

I hold therefore that there has been a misjoinder of charges in this case under appeal and that the charges could not be tried together.

The question arises as to whether this misjoinder amounts to an irregularity or is an illegality. If the former it may be cured under sec. 422, Criminal Procedure Code, but if the latter it vitiates the whole trial. It is clear from the wording of sec. 163 that such a misjoinder is an illegality: the words of sec. 163, Criminal Procedure Code, are mandatory "... there shall be a separate charge ... and it shall be tried separately ...." It is settled law that sec. 422 cannot be used to cure an illegality, vide *Subramania Iyer v. King-Emperor*[1] and *Rex v. Sakandar Khan*[2], and that any conviction on the misjoined charges must be quashed.

The question remains as to whether the Court should order a retrial on each charge as the Court is entitled to do under sec. 316(b) of the Criminal Procedure Code. In *Seng Sai Kee v. Rex*[3], Terrell, Ag. C.J., did not order a retrial in allowing an appeal on the ground of misjoinder though he stated that the convictions on each charge were on the merits of each case acceptable.

In this case under review the accused was acquitted on the 1st charge, but convicted of criminal breach of

trust on the remaining two charges. To support such a charge there must be evidence of an express or implied entrustment of the property concerned by the complainant to the accused. In the case of the money given to accused on 21st February, 1949, $1,250 in return for his cheque, there is no acceptable evidence that it was entrusted to him to pay into the bank in order to meet his cheque. It is clear from the evidence of complainant and Chin Ten Guen that the cash was handed to accused for his cheque for purposes of convenience of carriage and that there was no express trust or implied trust that that money would be made available to meet accused's cheque for $1,250. The only implication was that the accused's banking account would be solvent enough to meet the cheque when it was presented for payment.

Similarly with the cheque for $1,000 of 23rd February. It is clear from the evidence of the complainant himself that he knew that accused was going to obtain money to make good the $1,250 by visiting Singapore, and yet he handed him as an extra security $1,000 cash for another cheque. It cannot be said that he entrusted accused with this money to meet the $1,250 cheque already dishonoured.

For these reasons I am of opinion that, though a civil claim may lie against the accused on behalf of the complainant, the evidence does not disclose any criminal breach of trust. As to the learned Deputy Public Prosecutor's suggestion that the evidence may disclose other offences in regard to these sums, in my view there is not enough evidence of the criminal intention of accused at the time of the transactions to warrant a finding of guilty by the Court.

On the whole case it is clear that owing to the illegality of the misjoinder of charges and the absence of evidence as to an entrustment, the appeal must be allowed and the conviction quashed and the sentence set aside.

Appeal allowed.

KOK HONG LEONG KONGSI & 5 OTHERS v. SEOW KAH CHENG & ANOTHER.

[Court of Appeal (Willan, C.J., Spenser-Wilkinson, and Briggs, J.J.) March 9, 1950]

[F.M. — Civil Appeal No. 12 of 1949]

Partnership — Partner defending action brought against firm — Liability of.

In this case the respondents had successfully defended a suit brought against a partnership firm. The action against the firm was for the sum of $4,246.50 as damages for breach of an agreement to charter a motor boat and costs. The respondents defended the action on two grounds, first that the plaintiff in the action had suffered no damage and secondly that the plaintiff in the action had acted fraudulently and in collusion with the other partners of the firm, the appellants in this appeal, that the charter was not a genuine transaction and there was in effect no contract to be broken and so no breach. The respondents succeeded on the first ground and failed on the second and judgment was given for the plaintiff in the action for $1/- damages, each party to pay its own costs. In a partnership action for a declaration of dissolution, accounts and other relief an order was made that the solicitor and client costs of the respondents in defending the action against the firm be taxed and paid out of the assets of the firm subject to a limit of $4,246.50 The appellants appealed against this order.

Held, that as the respondents had by defending the action caused partnership assets to be preserved, they were entitled to receive from the partnership the expenses incurred by their defence and they were therefore entitled to receive the sum awarded to them by the order appealed from.

CIVIL APPEAL from an Order of Jobling, J.

R. D. Hume and *Ong Huck Lim* for the appellants.

E. A. de Buriatte for the respondents.

Cur. Adv. Vult.

Briggs, J. : — This is an appeal from an order of Mr. Justice Jobling made the 20th October, 1949, in the course of Penang Civil Suit No. 105 of 1947, a partnership action for a declaration of dissolution, accounts and other relief relating to the firm of Chop Teik Seng Leong, wherein the respondents are plaintiffs and the appellants defendants. The plaintiffs had on the 24th December, 1948, applied by summons in chambers in that suit for an order that their solicitor and client costs of defending Penang Civil Suit No. 126 of 1947, between Tan Kup plaintiff and Chop Teik Seng Leong defendants, be taxed and paid out of the assets of Chop Teik Seng Leong, and the defendants (other than the defendant Ch'ng Tian Seong) had on the 3rd May, 1949, moved in the same suit for assessment of damages under the usual undertaking as to damages given by the plaintiffs when they obtained an *ex parte* injunction against Tan Ghee Chuan, the 5th defendant, on 22nd October, 1947, the day on which the suit was filed. These two matters were heard together and the plaintiffs succeeded on both, subject to a limit of $4,246.50 as regards the payment of costs. The defendants appealed against both parts of the decision, but abandoned their appeal as regards the damages. The appeal is now only against that part of the order allowing taxation of the plaintiffs' costs incurred in Suit No. 126, and payment thereof out of partnership assets subject to a limit of $4,246.50.

It was alleged by the plaintiffs that the defendants had undertaken not to send out of the jurisdiction a